

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



November 16, 2000

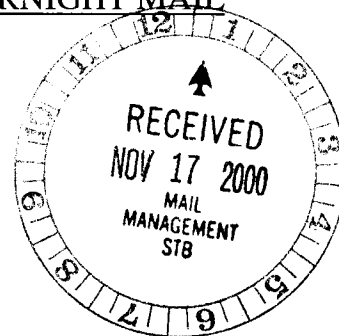
VIA OVERNIGHT MAIL

Surface Transportation Board  
Office of the Secretary  
Case Control Unit  
Attn: STB Ex Parte No. 582 (Sub-No. 1)  
1925 K Street, N.W.  
Washington, DC 20423-0001

ENTERED  
Office of the Secretary

NOV 17 2000

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Public Record



Dear Secretary:

Re: STB Ex Parte 582 (Sub-No.1)  
Major Rail Consolidation Procedures

Enclosed for filing is an original and 26 copies of a document titled "Comments of the California Public Utilities Commission." Please file-stamp the extra copy and return it to the undersigned in the enclosed stamped, self-addressed envelope. Also enclosed is an electronic copy of the filing in WordPerfect format on a 3.5-inch IBM compatible floppy diskette.

Thank you for your cooperation in this matter.

Sincerely,

  
Patrick S. Berdge  
Staff Counsel

Enclosures (27 paper, plus 1 diskette)

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ORIGINAL

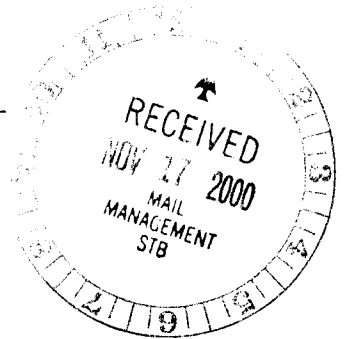
**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

Office of the Secretary

NOV 17 2000

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STB Ex Parte No. 582 (Sub-No.1)  
Major rail consolidation procedures.



**Comments of the California Public Utilities Commission**

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The California Public Utilities Commission ("Commission") hereby files its comments in Surface Transportation Board ("Board") Notice of Proposed Rulemaking ("NPRM") Proceeding Ex Parte 582 (Sub-No.1): "Major Rail Consolidation Procedures." The Commission is the primary state agency with safety oversight of railroad operations and has participated in numerous proceedings before the Board regarding rail matters.

We have reviewed the NPRM and support the Board's objective to ensure that future mergers will increase competition, during a time of growing concern about market concentration, in order to yield substantial public benefits while maintaining service stability. We offer several recommendations which we believe will increase the effectiveness of the proposed merger review procedures and help achieve the desired goals in the following pages.

**I. INTRODUCTION**

We strongly support the Board's efforts to protect the national rail transportation network through the development and implementation of regulations designed to ensure lower cost rail transportation rates and improve service through competition at a time of

growing rail market concentration. Today's rail industry has evolved into several exceedingly large carriers dominating traffic in the geographical regions they serve. With principally two carriers serving the West (Burlington Northern Santa Fe and Union Pacific) and two carriers serving the East (CSX and Norfolk Southern), any future mergers will most likely result in transcontinental railroads of immense size and scope. The unprecedented scale of a future merger will have far-reaching implications on competition and service levels requiring a rigorous examination by regulators, shippers, labor and all other affected parties prior to approval. Mergers must be carefully reviewed and structured to avoid increased monopoly or duopoly power.

## **II. RECOMMENDATIONS**

Our recommendations are grounded in our review of past merger proposals and our observation of the execution of several recently approved transactions. The following suggestions focus on the major themes of the proposed merger rules and generally address two key areas needed for successful regulatory programs – accountability and specificity. The recommendations include suggested additions or revisions (in bold) to the proposed rules in the NPRM.

### Recommendation 1: Better define the term “enhanced competition.”

The proposed rules in the NPRM should require merger applicants to include concrete provisions for enhanced competition. Applicants must enumerate and, where possible, quantify the net public benefits the merger will generate. Likewise, benefits arising from enhanced competition and other factors should be thoroughly identified so

that the applicant may be held accountable for any errors in actual merger implementation.

The NPRM rules do not specifically define the term “enhanced competition.”<sup>1</sup> The Board’s principal reason for the lack of specificity is to avoid limiting the approaches applicants could use to intensify competition. We believe, however, that a definition which assures lowered rates and/or provides meaningful and quantifiable service benefits will not unduly restrict an applicant’s creativity in this area, but is necessary to properly judge whether a proposal will truly enhance competition.

*Recommended addition to rule 1180. 1 (c ):*

***Descriptions of “enhanced competition” shall require clearly described merger benefits to shippers which demonstrably reduce rates by passing through cost savings from the efficiencies of scale resulting from the merger and/or result in meaningful and quantifiable service improvements. The applicant must discuss the effect of the proposed enhancement on shippers and shortline railroads captive to its rail system.***

Recommendation 2: Develop a more effective merger-oversight period with greater accountability:

We endorse the Board’s steps to formalize its oversight program to assess the transaction’s implementation. However, to be truly effective, the oversight program should include a detailed accounting of the applicant’s progress in attaining all claimed

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<sup>1</sup> The Board does proffer suggestions such as enhancing intramodal or rail-to-rail competition, the granting of trackage rights, the establishment of shared or joint access areas, and the removal of “paper” and “steel” barriers.” Corrected Decision #31369 at p. 13.

public benefits made in the merger application as well as measures indicating the level of competition generated by the combination. A simple listing by the applicant showing the status of all the promised service improvements, infrastructure projects and efforts to enhance competition coupled with an explanation why a particular item is pending would suffice. Statistics showing price and market share fluctuations after the merger indicating how well competition is functioning should also be filed by the applicant in its periodic oversight reports.

Further, we believe that the applicant be subject to civil penalties and/or sanctions if it fails to make sufficient efforts to meet its goals and accomplishments for improved service or enhanced competition and that the Board should be able to impose new conditions on the merger to take advantage of new opportunities to further enhance competition. We also believe that the Board's authority to impose conditions on the merged system should not terminate after the 5-year period but extend until the merger has been fully implemented, i.e., when the applicant fulfills all its representations made in the Service Assurance Plan ("SAP").

*Recommended addition to §1180.1(g):*

***Applicant oversight reports must: (1) provide an analysis for each route showing in percentage terms where rates have either risen or fallen since approval of the merger including the amount of traffic affected; (2) describe the status of all proposed capital improvement projects, service enhancements and efforts to enhance competition; (3) identify any decreases in service levels, and (4) provide estimates of market share of traffic by route.***

*Recommended revision to 1180.1 (g):*

*During the oversight period and extending until the merger has been deemed fully implemented, the Board will retain jurisdiction to impose any additional conditions or civil penalties and/or sanctions it determines are necessary to remedy or offset unforeseen adverse consequences of the merger or to further enhance competition.*

Recommendation 3: Develop a Service Assurance Plan with accountability.

Merger applications under the NPRM rules must include a SAP showing how the operations of the carriers will be combined, what accommodations will be made for passenger operations, yard and terminal operational plans and related issues. The substance of the plan must enable individual shippers to discern the real effects of the merger on their business. Contingency plans designed to rectify service problems, if they arise, must also be provided.

The SAPs will only be effective to the extent they are thoughtfully developed and implemented. The Board must closely monitor whether the carrier is fulfilling all aspects of its SAP and enhancing competition. In the interest of equity and to increase the likelihood that the plan will be followed, we believe the applicant should be required to reimburse shippers any additional cost they incur due to a merger-related service breakdown and that the Board have the authority to sanction the carrier as well. The Board's newly created Rail Consumer Assistance Outreach program can provide an effective way to facilitate resolution of shipper claims of monetary damages.

*Recommended addition to proposed §1180.10(a):*

***The merger applicant shall be subject to civil penalties and/or sanctions imposed by the Board in the event that the Board determines that post-merger service levels have deteriorated to a significant extent, or that the applicant failed to adequately comply with its Service Assurance Plan, or if the SAP was insufficient in addressing issues that the applicant knew or should have known could adversely affect service or safety at the time the SAP was submitted. The applicant must also reimburse shippers for costs they may incur due to any merger related service failures.***

Recommendation 4: Safety of transnational carriers.

We continue to caution that mergers involving carriers with operations outside the country present unique challenges to safety, particularly if the carrier maintains its headquarters in a foreign country. The proposed NPRM rules require the applicants to explain how cooperation with the Federal Railroad Administration ("FRA") will be maintained in transnational mergers. In addition, we believe the applicant should disclose in its application which country it plans to base operational functions such as dispatching and record keeping. We also propose that, as a prerequisite to the Board's approval of a merger application, all foreign-based applicants shall agree to respect the authority of federal and state rail safety agencies although headquartered in a foreign country.

*Recommended addition to proposed §1180.11(a):*

***Applicants must disclose any functions which may be moved to a foreign country following a merger and, as a prerequisite to Board approval, shall agree that any functions relocated will be***

***conducted in accordance with FRA and other state and federal governmental rail safety agency oversight and requirements.***

The Commission recognizes that certain rail safety regulations of foreign countries may provide comparable or even greater safety than those imposed by the FRA. For example, Canada required end-of-train telemetry devices years before the FRA required them. In those circumstances, the Commission encourages the applicant to apply that safety regulation in the foreign country so long as it thoroughly discusses the safety implications of the regulation at issue and the scope of its implementation in its Safety Integration Plan ("SIP"). Further, to the extent that the applicant must comply with foreign safety regulations inconsistent with those imposed by the FRA or the applicant's own operating rules, the applicant's SIP should thoroughly discuss these inconsistencies and evaluate the final level of safety resulting from the safety provision intended to be used by the applicant in the foreign country.

*Recommended addition to proposed §1180.11:*

***Applicants must discuss and evaluate foreign rail safety requirements inconsistent with those of the FRA and evaluate the safety impact of those requirements on their operations in their Safety Integration Plan ("SIP").***

Recommendation 5: Review proposals by non-applicant railroads and other interested parties to modify a pending merger with an emphasis on enhancing competition.



In previous merger proceedings, the Board routinely rejected pro-competitive proposals submitted by non-applicant railroads or other interested parties on the basis that the request did not address a specific merger related harm or would result in "new" competition (impermissible under existing Board policy). Examples of such requests involved providing shortline railroads with additional connections or increasing the number of rail carriers serving a shipper.

We recommend that the Board review such proposals in future merger proceedings in light of its new focus on enhancing competition. Therefore, we request that the Board affirm that it will approve proposals to the merger made by non-applicant railroads and other interested parties consistent with its objective to increase rail competition.

Dated: November 16, 2000

Respectfully submitted,

PETER ARTH, JR.  
LIONEL B. WILSON  
PATRICK S. BERDGE

By:

  
Patrick S. Berdge

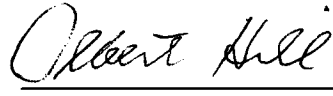
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Division of the Public Utilities Commission  
of the State of California

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the **Comments of the California Public Utilities Commission** by mailing by first-class mail a copy thereof properly addressed to each party in the captioned proceeding as identified and directed by the Surface Transportation Board in STB Ex Parte No. 582 (Sub-No. 1), # 30990 and subsequent Orders modifying and supplementing the service list herein.

Executed at San Francisco, California, this 16<sup>th</sup> day of November, 2000.

  
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Albert Hill